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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1956.

No. 820.

MADELINE V. SMITH, *Petitioner,*

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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To the Honorable Chief and the Associate Justices of the Supreme Court of the United States:

The petitioner, Madeline V. Smith, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW.

Neither the District Court nor the Court of Appeals wrote an opinion.

The order of the Court of Appeals affirming the judgment of the District Court, reads as follows:

Before Simons, Chief Justice, Allen and Miller, Circuit Judges.

> "*Per Curiam.* In this case appellant was indicted for willful evasion of income tax in her returns for the calendar years 1949 and 1950, found guilty by the jury, and duly sentenced by the Court.
>
> Appellant's principal contention is that the court committed reversible error in admitting as evidence the computation of income which appeared upon certain charts used by a Special Agent with the Intelligence Division of the Internal Revenue Service to explain his testimony. The Court properly instructed the jury with reference to these charts, that they were offered merely in explanation of the witness' testimony and computations, and it was for the jury to say 'whether there is *competent* evidence in the record to support the figures as shown by these charts.' The admission of such tabulations as an aid to the jury does not constitute reversible error. It has been approved by this Court in recent cases of income tax evasion. In *Gariepy* v. *United States,* 189 F. 2d 458, 462 (C. A. 6), the Court declared that the computation was at best 'but an estimate, but as an estimate it was entitled to the consideration of the jury because based on substantially the entire evidence in the record.' Cf. *Eggleton* v. *United States of America,* 227 F. 2d 493 (C. A. 6); *American Vitrified Products Company* v. *Wyer and Hansen,* 221 F. 2d 447 (C. A. 6). The use of such calculations was approved by the Supreme Court in *United States* v. *Johnson,* 319 U. S. 503, 519. The rec-

ord shows that within the holding of the Johnson case the trial court herein left the jury 'free to exercise its untrammeled judgment upon the worth and weight' of the evidence given in these charts.

The trial was fair. It was shown by overwhelming evidence that appellant had made substantial understatements of her income for the years in question. No reversible error appears in the record and it is ordered that the judgment of the District Court be and it hereby is affirmed."

JURISDICTION.

The order of the Court of Appeals affirming the judgment was entered December 12th, 1956, and the petition for a rehearing was denied by order entered February 6, 1957. This petition, accompanied by certified transcript of the record, as required by Rule 21, is filed with the Clerk within thirty days after the entry of the judgment affirming the conviction. The jurisdiction of this Court is invoked 28 U. S. C., Sec. 1254 (1).

QUESTIONS PRESENTED.

1. Whether the Trial Court erred in permitting over the objections of the petitioner a series of prejudicial charts (Exhibits 4, 5, 6, 7, 8, 9, testimony of Norris), prepared by the witness Norris more than two years before the said trial, to be introduced as exhibits, shown to the jury, and allowed to be taken into the jury room, said charts not being a summary of the evidence introduced in open court, but based on outside investigations conducted by the witness Norris.

2. Whether the Trial Court erred in permitting improper and highly prejudicial remarks to be made to the jury by the District Attorney in his closing argument, and in refusing to grant petitioner's motion for a mistrial on account of said prejudicial remarks.

3. Whether the Trial Court erred in permitting the witness Norris to testify with reference to approximately one hundred and twenty cases for the years 1949 and 1950 for which no proof was offered in open court, and allowing the witness Norris to fix the fees alleged to have been received by the defendant Smith from former clients of hers in these one hundred and twenty cases, which former clients the witness Norris testified were either dead, missing, or could not be located, based on an average of fees she had received in other cases.

4. Whether the sentence imposed by the Trial Court is illegal and excessive, in that: (a) The petitioner should have been sentenced under Section 3616 (a) of the Internal Revenue Code of 1939, rather than Sec. 145 (b).

5. Whether the defendant was denied a fair and impartial trial.

STATEMENT.

The record consists of three printed volumes comprising the appendices to the briefs in the Court of Appeals, the petitioner's appendix consisting of two volumes, an appendix and supplemental appendix. The appendix is numbered 1a to 316a, and the supplemental appendix is numbered 1a to 39a. Respondent's appendix is in one volume, numbered 1b to 107b.

On October 5, 1955, a two-count indictment was returned in the United States District Court for the Western District of Tennessee, Western Division.

The two counts cover the calendar years 1949 and 1950, respectively (Appellant's Appendix, pages 4a, 5a).[1]

On the 13th day of February, 1956, after a trial which commenced on the 6th day of February, the petitioner was convicted on both counts, and was sentenced to three years' imprisonment on each of the two counts, the sentences to run concurrently, and was ordered to pay a fine of five thousand dollars on each count, making a total fine of ten thousand dollars (Appellant's Appendix 33a, 34a, 35a).

The petitioner reported a gross income for the year 1949 in the sum of $14,252.30, and for the year 1950 in the sum of $14,950.50 (Appellant's App. 67a-68a).

The Government claimed a tax deficiency for the year 1949 in the sum of $6,378.79, and for the year 1950 in the sum of $6,720.25.

It was contended by the Government that the defendant failed to report all of her taxable income received from the practice of law, and sought to show this by the testimony of a portion of her former clients (Appellee's App. 8b-78b), and by the so-called net worth and expenditures and withdrawal method (Appellant's appendix, Hall, 95a-119a) (Appellant's Appendix, Norris, 131a-221a).

The petitioner, it was testified to at the time of the trial, was sixty-two years of age, and had been practicing law in Memphis, Shelby County, Tennessee, for thirty years or more (Appellant's App. 241a). She specialized in divorce cases, representing both men and women clients. Her practice did not extend beyond domestic matters, except in a very few instances where she did accept employment in matters involving other phases of law.

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[1]Except as otherwise indicated, record citations refer to the appendix and supplemental appendix to petitioner's brief in the Court of Appeals.

The good reputation of the petitioner, both as a citizen and as a lawyer, was established by the most prominent and respected members of the Memphis and Shelby County Bar (Appellant's Appendix 232a, 234a, 235a, 237a, 238a, 239a, 242a, 247a, 249a, 250a).

The exhibits 4 and 5 purport to show the figures contained in the indictment (App. 4a, 52, 183a, 217a). That is the taxes paid for the years 1949 and 1950 by the petitioner, also the taxes the Government contends she should have paid (App. 158a, 159a, 160a, 161a, 162a, 163a).

Exhibits 6 and 7 purport to be "computations of income" reported by the defendant, and "as corrected" for the years 1949 and 1950 (App. 166a, 167a).

Exhibit 8 purports to show items making up "unreported income" and "Government contentions for the years 1949 and 1950." (App. 173a).

Exhibit 9 purports to show cases making up "unreported income per indictment" and "Government contentions." (App. 176a, 177a, 178a).

These exhibits were introduced over the vigorous objection of counsel. The exhibits were the work of Hubert A. Norris, Special Agent with the Intelligence Division of the Internal Revenue Service (App. 131a).

He was permitted to stay in the courtroom during the entire proceedings, heard all of the testimony of the Government witnesses, and was the last witness for the Government.

During the argument with reference to the objection made by counsel as to the competency of Exhibits 4 and 5, the witness, Norris, testified as follows (App. 160a):

"The Court: Just a moment. Mr. Hanover says that these exhibits were prepared before the trial of the case, is that true?

Mr. Joyner: Yes, sir.

The Court: Now, during the trial it has been developed from time to time, as the witnesses were introduced, *that certain items were questionable as to whether or not they were income,* the amount of reported income, the amount of reported income to this defendant were all taxable items.

I have noticed Mr. Norris, in sitting there at the counsel table, has made notes, a good many notes. I am just wondering, now, if he is prepared to alter these figures shown by the blownup exhibits so as to take into account these items the Court has in mind. Have you done that, Mr. Norris?

A. I believe that there is not a chart there that will not be supported or cannot be properly supported by the evidence that has already been given.

Direct Examination by Mr. Joyner, Assistant District Attorney (Appellant's App. 165a).

Q. Now, let me get this straight, so there will be no question about it. You, of course, did prepare these charts in advance?

A. Yes, sir.

Q. *And I will ask you whether or not, since the charts have been prepared and since the proof has come in, you have prepared those figures, your figures made in advance, with the figures which we have presented here by the various witnesses?*

A. *Yes, I have kept a fairly close record on the figures that were used in preparing these charts and the figures of the income items testified to by the witnesses.*

Q. *Now, in your opinion as an expert on such matters—there are some discrepancies, aren't there?*

A. *Why certainly, yes, sir.*

Q. —*But substantially are the figures the same?*

A. *Yes, sir, they will be substantially the same.*

Q. I would like to have you pass me, then, the next chart containing that information, and we will pass that to Mr. Hanover.

Mr. Hanover: The same objection, may it please the Court." (App. 165a).

This testimony applies, of course, equally to all the exhibits introduced by this witness.

The charts were prepared in advance of the trial (App. 165a).

On cross-examination (App. 217a), the witness testified that the information as to the indictment came from the investigation he and Agent Fahr made, and that he had the information in September, 1953, more than two years before the trial.

Exhibits 6 and 7, according to Government counsel, was the manner in which the Government developed the figures that went into the indictment, and were admittedly prepared before the trial (App. 166a).

The Court observed that the chart was "*subject to some adjustment, here, there, and yonder.*" (App. 166a).

The Court stated that both Government and defendant counsel would have "*the privilege of examining the witness with respect to any alterations that are necessary from the proof we have heard.*" (App. 166a).

The Court itself recognized that there were discrepancies between the record and the testimony and exhibits of the witness Norris.

Exhibit 8 was prepared in advance from information obtained prior to the trial. The witness testified he prepared the information from the defendant's books, which

were never introduced, and comparing the "book figures" with the *testimony of witnesses who appeared in Court* (App. 175a, 176a).

Exhibit 9 is subject to the same objection, and is subject to the same argument (App. 176a, 177a).

The figures in that chart were based on a so-called "list of cases," showing only that the defendant had represented one of the parties. The introduction of the list had been previously objected to.

It was candidly admitted by Assistant District Attorney Joyner (App. 182a) that the witness took into consideration computations based on the number of cases filed by the defendant, on which the *Government produced no proof* (App. 183a, 184a, 185a, 186a, 187a, 188a). Also, in making up these figures, the witness Norris took into consideration his conclusion as to the average fee in 120 cases filed in 1949 and 1950 (See argument, Question Presented No. 3).

The witness also had before him for consideration in preparing said charts exhibit No. 11 of witness Hall (App. 191a, 112a, Cross-Examination 116a, 117a, 118a, 119a) an admittedly fictitious figure contained in the exhibit, with a discrepancy of $32,000.00 in deposits for the year 1949.

The "charts" and all other exhibits, including Hall Exhibit No. 11, were taken into the jury room by the jury when it commenced its deliberations (Supp. App. 37a).

During part of the testimony of this witness he was interrogated as to a qualified "expert witness." Later the Government repudiated this theory.

During an objection to the testimony of the witness Norris, we referred to him as "an expert." (App. 159a). There was no denial by the Government. On direct examination, Assistant District Attorney Joyner asked the

witness Norris to express his *"opinion as an expert,"* thus definitely labeling the witness as an expert (App. 165a). Yet, further along, on direct examination, when counsel again vigorously objected, and referred to the witness as an "expert," the trial judge made this observation:

> The Court: "Now, see here, Mr. Hanover, in the *first place, the witness is not testifying as an expert."*

This expression by the Court was acquiesced in by District Attorney Fitzhugh (App. 185a). Counsel then objected that if the witness was not testifying as an expert, then his testimony had no value whatsoever. The record shows the objection was overruled (App. 185a). Again (App. 194a), the District Attorney, Mr. Fitzhugh, stated that the witness Norris *was not testifying as an "expert."* This was reiterated in the District Attorney's closing remarks (App. 306a).

Other testimony of the witness Norris pertaining to the charts is as follows (Appellant's Appendix 182a-183a):

> "Mr. Joyner: Well, I would like to go into it to this extent, may it please Your Honor. *It is part of the Government's proof in this matter that there were other cases involved, and we want to make that proof now, which witnesses are dead or unavailable, out of pocket, and things of that nature.*
>
> Mr. Dave Hanover: Now, may it please the Court.
>
> Mr. Joyner: And I think we are entitled to show those cases.
>
> Mr. Dave Hanover: I think that is wholly incompetent.
>
> Mr. Joyner: And to show—
>
> Mr. Dave Hanover: I object to his making a speech, or—
>
> The Court: One at a time, there, gentlemen. One at a time. Let's see what he is getting at here.

Mr. Joyner: I say we are entitled to do that, *to prove by this witness that in preparing his charts he took into consideration computations based on the number of cases which were filed by this defendant on which we have produced no proof—that is, we cannot produce the client. There are* some five-hundred-odd cases involved here. *And we don't contend that we could produce each and every one. But we are entitled to show that he took into consideration other cases on which we haven't offered the client, as supporting a part of the figure which we say goes to make up the unreported income.*

Mr. Dave Hanover: Your Honor, I would like to be heard.

The Court: *I don't understand your statement about it. I don't understand your statement. What are you trying to do?*

Mr. Joyner: What we propose to do by this witness, may it please Your Honor, and by the testimony which I proposed to reach now, is to show that his charts were prepared on two types of information, one type being the actual testimony both—

The Court: Suppose you ask him the question, and we will rule on it.

Mr. Joyner: All right.

Q. *Mr. Norris, I will ask you sir, whether in preparing these so-called indictment figures you took into consideration in your computation other matters besides those which we have witnesses here to testify about (1092), and if so, what these matters were?*

A. Only with respect to—

Mr. Hanover: Now, I would like for him to answer the question yes or no first, because I would like to make an objection.

The Court: Answer directly, and then you have the right to explain.

A. *Yes, sir.*"

Objection was made based on the reasons stated in this petition, and the objection was overruled (Appellant's Appendix 182a-183a).

On cross-examination of the witness Norris testified as follows (Appellant's App. 218a-219a):

> "Q. So, then, what you have shown here today, I believe you stated is based on your investigation and observation, is that right, Mr. Norris?
>
> A. Well, it is not based on my observation. It is based on the *facts* that I was able to assemble.
>
> Q. Based on what you think the *facts* are?
>
> A. *Well, it is part of my job to determine whether something is a fact, or whether it is hearsay, or just plain circumstance.*"

Government counsel in his closing argument to the jury made the following unprovoked remarks. We quote from argument:

> (1) "Don't you know, Gentlemen, if it had been the Government's case, that His honor, learned in the law, would have thrown this case out—not after we had been through it all—on our opening statements." (App. 301a).

Again,

> (2) "Don't you worry about innocent people being punished. Do you think his Honor, there is not a man of higher integrity in this country than the Judge who presides over this Court right now. Are you worrying about innocent people being punished with Judge Boyd presiding over this Court?" (App. 304a).
>
> (3) "If this was the flimsy little deal that counsel claims it is, this case wouldn't have been in Court five minutes—never would have been indicted." (App. 304a).

These remarks designated 2 and 3 were vigorously objected to. The Court made no immediate ruling (App. 304a, 305a), and again, in his concluding remarks, the District Attorney stated as follows:

> "But I am sticking to the facts of this lawsuit, and I think I have summed it up as well as I know how, and the fact remains now that the Grand Jury has done its duty, his Honor is doing his duty, Mr. Norris has done his, and my assistants and I have done mine, and I leave this case with you gentlemen with confidence, and urging you to carry out your duty, and to follow the evidence and the law, and if you do, you must come to the conclusion that the defendant is guilty under both counts of the indictment." (App. 310a, 311a).

While the remarks of the District Attorney designated No. 1 were not immediately objected to, upon the completion of the District Attorney's argument, counsel moved the Court to enter a mistrial, but was overruled.

The question regarding the fixing of fees involves the manner in which the witness Norris fixed the "average" fees alleged to have been received by the petitioner in sixty cases for the year 1949, and sixty cases for the year 1950 (Appellant's App. 182a, 183a).

These were cases in which the former clients of the petitioner were either dead, missing, or could not be located by the witness Norris. Witness Norris stated that he fixed the fees in these cases by a calculation of the average fee known to have been collected by the petitioner in other cases, and taking the figure he arrived at in the known cases, setting it up as the figure in sixty cases in 1949, and sixty cases in 1950, where he was unable to contact the former clients of petitioner, and there was no other proof adduced in open Court to support this theory of the Government.

According to the witness' computations, the petitioner received $93.10 in sixty cases in 1949, and $105.10 in sixty cases in 1950. Computation of these figures shows that for sixty cases in 1949, according to the Government's contention, petitioner would have received $5,586.00 additional income, and in 1950 she would have received additional income in the sum of $6,306.00 (Appellant's App. 188a).

The petitioner was convicted on two counts of an indictment. The pertinent part of Count 1 is quoted:

> "Did unlawfully, wilfully, and knowingly attempt to evade and defeat a large part of the income tax due and owing by her to the United States of America for the calendar year 1949 by preparing and causing to be prepared, signed and mailing and causing to be mailed in the Western Division, Western District of Tennessee, a false and fraudulent income tax return on her behalf, wherein it was stated that her net income for said calendar year was $8,119.23, and that the amount of the tax due and owing thereon was the sum of $1,419.48, whereas, as she then and there well knew, her net income for the said calendar year was the sum of $24,054.34 upon which said net income there was owing to the United States of America an income tax of $7,797.97, and which return the defendant filed or caused to be filed with the Collector of Internal Revenue for the Internal Revenue District of Tennessee."

The verbiage of the second count is similar to that of the first count, except for the year and the amounts of taxes.

The petitioner was sentenced under 145b of the Internal Revenue Code of 1939 as for a felony to three years on each count, to run concurrently, and fined $5,000.00 on each count, for a total of $10,000.00.

The petitioners should have been sentenced as for a misdemeanor, under Section 3616 (A) of the Internal Revenue Code of 1939.

REASONS WHY THE WRIT SHOULD BE GRANTED.

I.

The trial court erred in permitting the introduction of the charts.

The Court of Appeals for the Sixth Circuit has applied the ruling laid down in Johnson v. U. S., 319 U. S. 503, to the facts herein, thus extending the doctrine of that case, which was not intended by the opinion, and such action of the Court of Appeals is in conflict with decisions of other federal courts of appeal, which courts have rejected such an extension of the doctrine.

Approximately *one hundred and seventy-four witnesses,* who, with the exception of a small number, were former clients, testified for the Government. Agent Norris testified that there were *more than two hundred and fifty-eight cases* not listed on petitioner's books, in which fees were collected by petitioner, and that *eighty-one cases* were understated in her income tax returns. This is a total of three hundred and thirty-nine cases, which means that Mr. Norris, the Government witness, apparently talked to or conferred with one hundred and sixty-five witnesses who did not appear in the courtroom, so, in giving his "expert testimony," the witness Norris took into consideration the statements of a hundred and sixty-five witnesses, or former clients, with whom he had apparently conferred, but who were not present in the courtroom, so that the jury could weigh their testimony, and the appellant was deprived of her right of cross-examination. Thus, the witness Norris passed on the credibility and weighed the testimony of these one hundred and sixty-five witnesses. Therefore, his testimony, rather than being a summation based on the entire record in open Court, became a conclusion based on his extensive "outside investigation."

Apparently the Government offered these exhibits, and the Court received them in evidence, on the theory that Mr. Norris was an *expert witness,* and that in a prosecution for income tax evasion, such a witness may give testimony of his computations based upon substantially the entire evidence in the record as to the defendant's income. We recognize that the Supreme Court of the United States, in *U. S.* v. *Johnson,* 319 U. S. 503, has upheld this theory. It is the contention of petitioner in this case that Exhibits 4, 5, 6, 7, 8, and 9 were something entirely different from that which was authorized or contemplated in the Johnson case. Petitioner says that Agent Norris went beyond the mere act of summarizing such testimony, and that he himself endeavored to pass upon the reliability or want of credibility of certain witnesses in making his summary. It is further contended that because he did so, Exhibits 4, 5, 6, 7, 8, and 9 constitute the substitution of Agent Norris' ideas and interpretations, in lieu of the evidence, and that, in consequence, the province of the jury was invaded.

After the Johnson case was decided by the Supreme Court, the Circuit Court of Appeals for the Third Circuit had before it almost precisely the same type of fact situation as is here reflected from the record. In *U. S.* v. *Ward,* 169 F. 2d 460 (C. C. A. 3), a Government witness who had purported to summarize the testimony of the predecessor witnesses went beyond the mere act of summarizing, and himself attempted to pass upon the reliability and credibility of the witnesses. The Government contended that, since he was an expert, and that since the Johnson case had been decided by the Supreme Court, it was not error for the Government witness to so testify.

In rejecting the extension of the doctrine in the Johnson case, the Court said:

"The effect of Johnson's testimony was not simply to exclude 'some Government testimony.' Rather, it affirmatively declared the unreliability of records and witnesses on a basis neither accessible to the jury nor assessable by it. Moreover, when Johnson testified that the witnesses whose testimony he had used in his calculations were considered by him to be 'reliable,' because their testimony coincided with the sworn statement they have previously given to the Federal Bureau of Investigation, he was once more performing a jury function, while endowing those witnesses with an aura of credibility, impenetrable by the jury."

The Court held that Johnson's testimony was erroneously admitted in evidence, and was prejudicial, and ordered a new trial.

In a similar factual situation as in the present case, the Fifth Circuit held, in *Steele* v. *United States*, 222 F. 2d 623-629, as follows:

"Recognizing that the Supreme Court in *United States* v. *Johnson*, 319 U. S. 503, 63 S. Ct. 1233, 87 L. Ed. 1546, has held that in a prosecution for income tax evasion, an expert witness such as Howard purported to be may give testimony of his computation based upon substantially the entire evidence in the record as to the defendant's income, the defendant contends that the admission of these exhibits, their offer and reception in evidence, and their sending into the jury room, were something entirely different from what was authorized in the Johnson case; that *Agent Howard did not merely attempt to summarize the testimony; that on the contrary, he undertook to evaluate it, endeavoring to pass upon the credibility of certain witnesses, and to determine what weight should be given their testimony, so that, by his testimony as to the exhibits and their sending to the jury, the Government, through its witness Howard, was enabled to invade, indeed to take over the province of, the jury.*"

When these charts were introduced over the most vigorous protest of counsel the Court stated (App. 168a, 169a) that the charts were being introduced as *"merely explanatory of the witnesses' testimony and computation."* (App. 198a). *"Merely represents the Government's contention, they are not evidence."*

Apparently the Court allowed these exhibits to go in to show how Norris arrived at his results. This was misleading, for these charts show only *"what he arrived at."* The sending into the jury room of these charts for the jury to use in their deliberations certainly erased any effect the remarks of the Trial Judge was intended to have. Thus the Government was given an unfair advantage over the defendant. As indicated by the Court's remarks, the exhibits were accepted into evidence in a restricted manner. They were essentially interpretations, conclusions, and arguments of the witness, based on his own findings, and to allow these exhibits to go into the jury room would mean that the jury would take with them the argument and interpretations he placed on the people he contacted, and the witnesses who testified.

The Circuit Court of Appeals in its opinion made mention of the fact that the Trial Court stated it was for the jury to say "whether there is *competent* evidence in the record to support the figures" of the witness Norris. Thus it was left to the jury to pass upon the *legality* of the evidence, as well as the weight and credit to be given it. It was for the Trial Judge to say whether or not it was competent, and not the jury.

There were no guarding instructions given in the Judge's charge (Appellant's Supp. App. 11a).

The instructions given the jury at the time of the introduction of the charts by the Trial Judge were inade-

quate and insufficient, in view of the language of this Court in *Holland* v. *U. S.*, 348 U. S. 121, 75 S. Ct. 127-131, wherein the Court mentioned the great danger that may result to a defendant, in that the jury may assume that, once the Government has established its figures, in its net worth computations, the crime of tax evasion follows automatically, especially where the jury is allowed to take into the jury room the various charts, without guarding instructions.

II.

The remarks made by the District Attorney in his closing argument were improper and highly prejudicial, and the Court's refusal to grant a mistrial on the grounds of said prejudicial remark was error.

The remarks of the District Attorney with reference to the jury "worrying about innocent people being punished" had the effect of inducing the jury to *surrender their responsibility*, on the theory that the Court would prevent any injustice from being done.

One of the most damaging and prejudicial arguments that could possibly have been made was made by the United States District Attorney in the conclusion of his argument. There was no implication here—there was a plain, unvarnished statement that the Trial Court wanted the defendant convicted. He made the Court an advocate, an ally. So overpowering was the zeal and desire of the U. S. District Attorney for a conviction that he was willing to tell the jury in so many words that he and his assistants, the Government witness Norris, the grand jury, the Court, and the petit jury were members of a team which had the job of convicting the petitioner and sending her to the penitentiary.

Vierick v. *U. S.*, 318 U. S. 236, 248, 63 S. Ct. 561, 566:

"A Federal prosecuting attorney should not in addressing the jury make an appeal wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only have been to arouse passion and prejudice and in so doing may constitute prejudicial error."

Pierce v. *U. S.*, 86 F. 2d 949, C. C. A. 6, 1936:

"Public interest requires that the Court of its own motion protects suitors and their right to a verdict uninfluenced by appeals of counsel to appeals of prejudice."

N. Y. Central Railroad Co. v. *Johnson*, 279 U. S. 310, 318, 49 S. Ct. 300, 302, 303:

"It is the duty of the Court to correct the right to a verdict uninfluenced by the appeals of counsel to passion or prejudice."

Mendelsohn v. *U. S.*, 58 F. 2d 532, 61 App. D. C. 127:

"* * * It is always improper on the part of the District Attorney to suggest to the jury directly or indirectly that they *should surrender any of their responsibility with the idea that the Court will see to it that no injustice results.*"

Steele v. *U. S.*, (5th Cir.) 222 F. 2d 628-631:

"It will suffice to say of the second specification of error that, though the argument of the United States attorney was not objected to, it did go unadmonished and uncorrected so far out of bounds as to put the District Judge in error in not, of his own motion, admonishing the Government's counsel to desist from that kind of argument and directing the jury that the argument was incorrect and unfair, and that they should not consider it. * * * *Finally, the statement in*

the conclusion of his summation, linking himself, the jury, and the Judge as interested on the same side of the case cannot be justified or excused."

Snipes v. *U. S.*, 230 F. 2d 165-166-167 (6th Cir.). *Rule 52 (b), F. R. C. P.*

III.

The Court erred in permitting the witness Norris to testify as to his computations involving the manner and method of fixing "average fees."

The method of fixing the fees in one hundred and twenty cases for 1949 and 1950 in which the witnesses were dead, missing, and could not be located was purely a conclusion of the witness Norris, rather than a summary based on the proof in the record.

The amounts given to the jury were substantial, compared to the total amount involved, and had the effect of prejudicing the jury.

IV.

The defendant should have been sentenced under Section 3616 (a) of the Internal Revenue Code of 1939.

It is the contention of this petitioner that as a matter of law under the indictment in this case, she could only have been convicted of a misdemeanor under Section 3616 (a) of the Internal Revenue Code of 1939, imposing a maximum sentence of one year imprisonment and a fine of $1,000.00 on each count.

This Court has the right to correct petitioner's sentence, so as to conform to the statute.

The indictment in the present case is substantially the same as in the cases cited below:

Rule 52 (b), F. R. C. P.

Berra v. *U. S.*, 351 U. S. 131, 76 S. Ct. 685.

See brief of Poncett Davis as *Amicus Curiae* in *Costello, Petitioner*, v. *U. S.*, No. 666, filed October Term, 1956.

V.

The defendant was denied a fair and impartial trial.

The petitioner was denied a fair and impartial trial, but in view of the length of this petition, we will not discuss this point, other than to refer to the petitioner's motion for a judgment for acquittal (App. 222a to 227a).

CONCLUSION.

In conclusion, it is our contention that the matters complained of are *errors* affecting the substantial rights of the petitioner. As has been often stated, the question in a criminal trial is not whether guilt is spelled out of a record, but whether guilt has been found by a jury, according to procedures and standards appropriate for criminal trial in a Federal Court; not whether there is "overwhelming evidence," but whether such "overwhelming evidence" has been properly introduced into the record.

Justice Frankfurter in his opinion in *Bollenbach* v. *U. S.*, U. S. 326, pp. 607-614, states as follows:

> "In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by jury under appropriate judicial guidance, however cumbersome that process may be."

Forster v. *U. S.*, 237 F. 2d 617-621 (Ninth Circuit), decided October 19, 1956.

Kotteakos et al. v. *U. S.*, 328 U. S. 750.

PRAYER.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this court, directed to the Court of Appeals for the Sixth Judicial Circuit, commanding that Court to certify and send to this Court for its review and determination on the day certain to be therein named, a full and complete transcript of the record and proceedings in the case entitled on its docket, "*Madeline V. Smith* v. *United States of America,*" No. 12,897, to the end that said case may be reviewed and determined by this court as provided by 28 U. S. C., Sec. 1254, and the applicable rules promulgated by this court governing applications for certiorari in criminal cases, and that the judgment of the Court of Appeals be reversed by this Honorable Court, and that petitioner may have such other and further relief in the premises as to this Honorable Court may seem right and proper.

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